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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. [REDACTED] 75

THE CITY OF NORTH CHICAGO, A MUNICIPAL CORPORATION, JOHN P. DROMEY, ANTON MACROWSKI, JR., WILLIAM ORLOWSKI, PETER CZAJKOWSKI, BENJAMIN NEWNHAM, LESLIE CALDER, JOSEPH McKILLEN, LOUIS ROSE, CASIMIR ZDANOWICZ AND WALTER KOZIOL,

Petitioners,

vs.

THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

PETITION OF THE CITY OF NORTH CHICAGO, ET AL., FOR A WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

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Petitioners,

vs.

THE MACCABEES, A CORPORATION, THE MARYLAND CASUALTY COMPANY, A CORPORATION, AND GUST F. SANTRY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, The City of North Chicago, a municipal corporation, John P. Dromey, Anton Macrowski, Jr., William Orłowski, Peter Czajkowski, Benjamin Newnham, Leslie Calder, Joseph McKillen, Louis Rose, Casimir Zdanowicz and Walter Koziol,* pray that a writ of certiorari issue to review a judgment of the United States Circuit Court of

* Individual petitioners are present officials of the City of North Chicago, none of whom held office at the time of the construction of the sewer involved in the special assessment proceeding.

Appeals for the Seventh Circuit, entered on appeal by respondent, The Maccabees, a corporation, from a decree of the District Court of the United States for the Northern District of Illinois.

Jurisdictional Statement.

The judgment of the Circuit Court of Appeals was rendered on January 13, 1942 (R. 307), and rehearing was denied on February 13, 1942 (R. 308). The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, U. S. Code, Title 28, Section 347, as amended. See also Rule 38(5)(b) of this Court.

No question of the validity of any statute is involved. Various provisions of the Local Improvements Act of Illinois are material; the statute is summarized and its pertinent sections quoted in full in the Appendix (*infra*, page 23).

Questions Presented.

The principal question presented by this petition is, whether it is proper for a Federal court to direct the issuance of a mandatory injunction, requiring a municipal corporation and its officials to comply with a state statute, providing for local improvements by special assessment, in a case which is in the Federal court only by reason of diversity of citizenship, where similar relief, if warranted, could have been obtained in a state court by mandamus, but not by any form of equitable relief.

Subsidiary questions are the adequacy of the bill of complaint to state a case for equitable relief on grounds of fraud, conspiracy, or accounting.

Statement of the Case.

The Maccabees, a Michigan corporation, plaintiff in the District Court and hereinafter referred to as "plaintiff," filed a bill in equity in that Court on August 25, 1934, claiming to be the holder of certain temporary or interim special assessment bonds issued by the City of North Chicago in connection with the construction of a sewer. The defendants to the original complaint were the City, various individuals then holding office in the City administration, the contractor who built the sewer and the surety on the contractor's bond. The individual petitioners herein were not identified with the City administration at the time of the construction of the sewer and the delivery of the interim bonds to the contractor, plaintiff's assignor. Equitable relief, including a mandatory injunction and an accounting, was prayed. Motions to dismiss the bill were filed by the defendants and were sustained by the District Court. The Circuit Court of Appeals reversed the decree of the District Court.

The material facts charged in the complaint are as follows:

In February, 1924 the City of North Chicago adopted an ordinance for construction of a sewer to be paid for by special assessment (R. 5, 6, 30). In March the same year, the City filed special assessment proceeding No. 162 in the County Court of Lake County (R. 7). The Court confirmed the assessment. In June of the same year, the bid of defendant Santry was accepted and a contract executed by him and the City for the construction of the sewer (R. 7, 36). Santry and defendant, Maryland Casualty Company, as surety, furnished a completion bond to the City in the penal sum of \$16,000.00 (R. 8, 41). Construction was commenced and was paid for in assessment bonds in installments during July and August of the same year. The work was completed August 27 (R. 9). Plaintiff does not know the exact number of bonds delivered to Santry, but all of the bonds were sold to Hanchett Bond Com-

pany. October 1, 1924, plaintiff purchased \$10,000.00 of said bonds from that company at par, and is the owner and holder thereof (R. 10).

Santry defaulted in the performance of his contract, and did not construct the sewer in accordance with the ordinance in that the flow line is wholly different from that required (R. 10, 11). Plaintiff avers on information and belief that the Board of Local Improvements and the City Engineer received complaints from property owners before the last bonds had been delivered to the defaulting contractor (R. 11); that under Sec. 84 of the Illinois Local Improvements Act it was the duty of the Board to certify to the County Court within thirty days after August 27, 1924, whether or not the improvement had been constructed in accordance with the contract and the ordinance (R. 12), but that no such certificate has ever been filed (R. 14).

Changes have been made in the sewer by the installation of pumps and by connection with the sewer system of the City of Waukegan, whereby it has been made to function as a force flow rather than a gravity flow sewer (R. 16). In 1930 plaintiff commenced to negotiate with the City and the Casualty Company in an effort to have the special assessment proceedings completed (R. 17). Plaintiff avers that at the suggestion of the then acting City Attorney, and on his representation that a certificate would be filed if the County Court so ordered, plaintiff, on May 31, 1931, filed a petition (still pending) in the County Court assessment proceedings praying for an order requiring the Board to file a certificate of cost and completion. An order was entered by the County Court pursuant to the petition, but the Board filed no certificate. Plaintiff then sought to have the members of the Board held in contempt but the County Judge set aside the order requiring the Board to file the certificate (R. 17, 18). The County Judge is an official elected by the voters of Lake County, including those whose property was assessed (R. 18). Plaintiff avers that the negotiations for settlement were conducted for the purpose of inducing plaintiff to believe that the matter might be

disposed of, until such time as its rights had been barred by limitation (R. 19).

Under Section 90 of the Local Improvements Act, the holders of special assessment bonds have no claim against the City except from collections made (R. 19), and while said Section provides relief by way of mandamus or injunction, plaintiff has no remedy at law, and no certificate will be filed unless the Federal Court compels the filing thereof (R. 20). Santry is wholly insolvent and since the County Court must find that the sewer does not conform to the contract and the ordinance, plaintiff's bonds are worthless and it will be required to surrender the same (R. 21, 22).

None of the installments of principal of the assessment have ever been collected except approximately \$1,699.50 paid on initial installments. Special assessment collections under Illinois law constitute a trust fund for bondholders. Plaintiff avers that the records of the Board and of the City are inadequate for a trust accounting, but it appears that no collections were made after October 2, 1925. Plaintiff has received \$868.25 on account of interest, but has received no payment of principal. Payments made to plaintiff were fraudulent in that they should have been made to all bondholders pro rata. Accordingly an accounting is necessary (R. 22, 26, 27).

The prayers are:

1. For an injunction directing the individual defendants to file a certificate of cost and completion in the County Court of Lake County;
2. For judgment against the surety in the amount of damage suffered by plaintiff, and for payment by the surety of such sums as are necessary to complete the sewer;
3. For an accounting by the City and for judgment against it for collections found to have been unlawfully diverted;
4. For retention of jurisdiction until the sewer has been completed, the County Court has approved the same, and new bonds have been issued to plaintiff;
5. For general relief (R. 28, 29).

Answers were filed in October, 1934 (R. 47, 52), and the cause was subsequently set for trial January 5, 1937, but was continued generally (R. 57, 58). The plaintiff amended the bill by making additional persons, including the individual petitioners, parties defendant (R. 44, 63, 71, 81). The cause was twice again set for trial and stricken from the call (R. 70, 80, 85). In May, 1940, motions were filed by the defendants for judgment on the pleadings (R. 87, 88). Briefs were filed (R. 102-159) and the District Court entered an order sustaining the defendants' motions (R. 159).

On September 20, 1940, the Court vacated its order for judgment on the pleadings (R. 194) and heard oral arguments (R. 205-279), after which the Court granted all defendants leave to withdraw their answers and to file motions to dismiss (R. 282). The motions were thereupon allowed and the order allowing the same was the order appealed from. On January 13, 1942, the Circuit Court of Appeals for the Seventh Circuit reversed the judgment of the District Court and remanded the case (R. 307).

Reasons for Granting the Writ.

1. A conflict exists between the decision of the Circuit Court of Appeals for the Seventh Circuit in this case and the Circuit Court of Appeals for the Fifth Circuit in the case of *Fineran v. Bailey*, 2 Fed. (2d) 363, on the question whether or not a mandatory injunction should be issued as a substitute for, or in lieu of, a writ of mandamus. The Fifth Circuit held in the case last mentioned that it was improper to issue a mandatory injunction under such circumstances, but the Seventh Circuit in the instant case holds by necessary implication that this practice is proper.
2. The Circuit Court of Appeals has decided an important question of local law in a way conflicting with the applicable local decisions, in holding that a non-resident owner of Illinois local improvement bonds was not limited, in the Federal court, to such remedies as would have been available in the state court to a resident owner of such

bonds, but could obtain equitable relief not permitted by the state decisions. The question is important because such a holding will tend to increase greatly the volume of Federal court litigation by making the Federal forum more attractive to owners of such bonds.

3. The Circuit Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court:

(a) In holding that, in a diversity case, the Federal District Courts can and should grant relief of a kind which the state courts cannot and would not grant;

(b) In holding that, in a diversity case, the Federal District Court should undertake to coerce a municipality and its officers to perform acts required by state law, when such coercion could have been, but was not, sought through a mandamus proceeding in the state courts;

(c) In holding that the Federal District Court committed an abuse of discretion in denying relief in equity, although the state court legal remedy was adequate, and although the granting of relief would involve a conflict between the Federal courts and the State;

(d) In failing to follow the substantive law of Illinois (see *Pecheur Lozenge Co., Inc. v. National Candy Co., Inc.*, decided March 30, 1942, not yet reported; No. 648, October term, 1941), which fixes and measures the rights of holders of local improvement bonds, irrespective of the forum chosen for the enforcement of those rights;

the Federal question being an important one because it affects the relations between the Federal courts and the courts of the State of Illinois (see *Wichita Royalty Co. v. City National Bank*, 306 U. S. 103, 106-7; *Beal v. Missouri Pac. R. Co.*, 312 U. S. 45, 49).

4. The Circuit Court of Appeals departed from the usual course of judicial proceedings:

(a) By predicating its decision in substantial part upon matter not in the record;

(b) By failing to follow its decision in the prior case of *Tolman v. Clark County Drainage District*,

62 Fed. (2d) 226, cert. den., 289 U. S. 724, without assigning any reason whatsoever for such failure, notwithstanding that the *Tolman* case was applicable and controlling;

thus calling for an exercise of this Court's power of supervision.

And in support of this, their petition, petitioners submit the brief which follows.

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